Soon Pee Tek v Bukit Tinggi Resort Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO S6–24–2171 OF 1999
AZMEL J
11 JUNE 2000

Contract *— Termination — Validity — No vacant possession four years after SPA and payment of 30% of purchase price — No date for performance specified in SPA — Whether notice of termination given — Whether 14 days' notice sufficient notice of termination — Contracts Act 1950 s 47*

By a sale and purchase agreement ('SPA') dated 20 May 1995 the plaintiff agreed to purchase a bungalow lot from the defendants who were developers. Some four years later, the plaintiff had paid some 30% of the purchase price but the defendants had yet to deliver vacant possession of the property to the plaintiff. The plaintiff purported to terminate the agreement and demanded the return of the moneys paid. The defendants contended that as the agreement did not specify a date for performance, the date of handing over of the property would be at the convenience of the defendants. The plaintiff sought a declaration that the agreement had been duly terminated and claimed the return of the monies paid.

Held, dismissing the application:

(1) Since the SPA was silent on the date of the handing over of vacant possession of the bungalow lot to the plaintiff, s 47 of the Contracts Act 1950 ('the Act') applied (see p 98A–B).

(2) It was imperative for the plaintiff to issue a notice to terminate the agreement which did not contain a specific date for performance. No such notice was issued by the plaintiff. From the letters exhibited by the plaintiff, the letters issued before the termination were merely asking for information on the progress of work and estimated date of delivery of vacant possession of the said lot (see p 99F–H).

(3) As the giving of notice is a precondition to issuing a letter of termination, the failure of the plaintiff to give notice was fatal to the plaintiff's purported termination of the agreement (see p 99H).

(4) Even assuming the letters from the plaintiff constituted the notice of termination, the giving of only 14 days' notice would not be 'reasonable time' within the meaning of s 47 of the Act. The condition of the land — a jungle area with mountainous terrain, was an important factor to be considered in determining what would be the reasonable time to hand over the plot to the plaintiff (see p 100A–D).

(5) Under the SPA the delivery of vacant possession was conditional upon completion of the infrastructure works by the defendant and no specific date was stated for this. The plaintiff was thus aware

of the possibility of delay when the plaintiff signed the SPA (see p 100E–H). A

[Bahasa Malaysia summary

Melalui satu perjanjian jual beli ('PJB') bertarikh 20 Mei 1995 plaintif bersetuju membeli satu lot rumah kecil satu tingkat daripada defendan-defendan yang merupakan pemaju. Hampir empat tahun kemudian, plaintif telah membayar kira-kira 30% harga belian tetapi defendan-defendan masih belum menghantar serah milikan kosong hartanah tersebut kepada plaintif. Plaintif kononnya menamatkan perjanjian dan menuntut supaya wang yang telah dibayar dikembalikan. Defendan-defendan berhujah bahawa oleh kerana perjanjian tersebut tidak menetap satu tarikh untuk pelaksanaan, tarikh menyerah hartanah tersebut akan berlaku pada masa yang sesuai dengan defendan-defendan. Plaintif memohon satu deklarasi bahawa perjanjian tersebut telah ditamatkan secara sah dan menuntut supaya wang yang dibayar dikembalikan. B C D

Diputuskan, menolak permohonan tersebut:

(1) Oleh kerana PJB tidak menyebut tentang tarikh menyerah milikan kosong lot rumah satu tingkat kepada plaintif, s 47 Akta Kontrak 1950 ('Akta tersebut') adalah terpakai (lihat ms 98A–B). E

(2) Adalah penting untuk plaintif mengeluarkan satu notis untuk menamatkan perjanjian tersebut yang tidak mengandungi satu tarikh khas untuk pelaksanaan. Tiada notis demikian telah dikeluarkan oleh plaintif. Dari surat yang diekshibitkan oleh plaintif, surat yang dikeluarkan sebelum penamatan cuma bertanya tentang maklumat mengenai kemajuan kerja dan anggaran tarikh milikan kosong lot tersebut (lihat ms 99F–H). F

(3) Oleh kerana pemberian notis bukanlah satu prasyarat sebeum mengeluarkan surat penamatan, kegagalan plaintif untuk memberi notis adalah padah kepada penamatan perjanjian oleh plaintif yang dikatakan (lihat ms 99H). G

(4) Jikapun menganggap surat-surat tersebut daripada plaintif membentuk notis penamatan, pemberian notis 14 hari sahaja tidak merupakan 'masa yang munasabah' dalam lingkungan maksud s 47 Akta tersebut. Keadaan tanah tersebut — kawasan hutan dengan rupa bumi yang berbukit, adalah satu factor yang penting untik diambil kira dalam menentukan bilakah masa yang munasabah dalam menyerahkan plot tersebut kepada plaintif (lihat ms 100A–D). H

(5) Di bawah PJB, hantar serah milikan kosong adalah bersyarat ata penyelesaian kerja-kerja infrastruktur oleh defendan dan tiada tarikh tetap dinyatakan untuk tujuan ini. Maka plaintif menyedari kemungkinan kelewatan apabila plaintif menandatangani PJB (lihat ms 100E–H).] I

Notes

For cases on termination of contract, see 3(2) *Mallal's Digest* (4th Ed, 2000 Reissue) paras 3885–3904.

Cases referred to

Penang Development Corp v Khaw Chin Boo & Anor [1993] 2 MLJ 161 (refd)

Legislation referred to

Contracts Act 1950 s 47

Gideon Tan (*Gideon Tan Razali Zaini*) for the plaintiff.
B Thangaraj (*Thangaraj & Assoc*) for the defendant.

Azmel J: The defendant in this case is the owner of a piece of land with an area of about 15,800 sq acres. It is situated at the mountainous jungle near the Banjaran Titiwangsa in the district of Bentong, Pahang. The defendant had obtained the necessary approvals from the relevant authorities to develop the said land for various projects. Towards such objective the defendant also undertook to build the necessary infrastructure which was not in existence before the defendant started to develop the said land. Part of the said land was converted for residential development and divided into various bungalow lots for sale to potential purchasers. The plaintiff was one of those purchasers of the said bungalow lots. A sale and purchase agreement was entered into between the plaintiff and the defendant dated 20 May 1995. To date the plaintiff had paid a sum of RM108,286.36 equivalent to 30% of the purchase price. But the defendant had not handed over vacant possession of the said bungalow lot to the plaintiff (Parcel C, Plot No 163). Because the defendant had failed to hand over vacant possession of the said bungalow lot after a period of about four years from the date of the sale and purchase agreement, the plaintiff issued a letter to the defendant terminating the said agreement, dated 20 September 1999. Subsequently, on 16 November 1999, he filed this application to court against the defendant to declare that the said sale and purchase agreement had been legally terminated and at the same time applied for the refund of the sum of RM108,286.36 plus 8% interest.

In disputing the plaintiff's application, the defendant contended that the said sale and purchase agreement did not state the specific date of the handing over of the said bungalow lot to the plaintiff. In other words, the specific date of the handing over of the said bungalow lot is silent. The defendant therefore contended that the handing over of the said bungalow lot to the plaintiff would be at the time convenient to the defendant having regard to the special facts and circumstances of this case.

In the light of the background of this case as stated above, the only issue that is required to be determined is whether the termination of the said sale and purchase agreement by the plaintiff vide the letter dated 20 September 1999 was lawful and valid.

It is common ground that the said sale and purchase agreement did not contain any specific date of the handing over of vacant possession of the bungalow lot to the plaintiff by the defendant. Since the date of the handing over is silent, s 47 of the Contracts Act 1950 ('the Act') applies. Section 47 reads:

> Time and place for performance of promise where no application is to be made and no time is specified
>
> Where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time.
>
> Explanation — The question 'what is a reasonable time' is, in each particular case, a question of fact.

The term 'reasonable time' had been succinctly explained by Mohamed Dzaiddin J (as he then was) in the case of *Penang Development Corporation v Khaw Chin Boo & Anor* [1993] 2 MLJ 161 where his Lordship said at pp 163–164:

> So when no time is specified, the contract must be performed within a reasonable time — s 47 Contracts Act 1950. What is 'a reasonable time' is, in each particular case, a question of fact (ibid). However, the plaintiffs cannot arbitrarily fix the time. *It must be reasonable having regard to the state of things at the time when notice was given.* (Emphasis added.)

It was the judgment of Mohamed Dzaiddin J (as he then was) that it is imperative for the plaintiff to issue a notice to terminate before finally terminating any agreement which contained no specific date of performance. In the said *Penang Development Corporation* case, his Lordship went on to state at p 164:

> In my opinion, a written notice giving time to complete the delivery is necessary since time by which the contract was to be completed has not been stipulated, nor made the essence of the contract according to 9 *Halsbury's Laws of England (4*th Ed) para 485:
>
> > 'In cases where time is not originally of the essence of the contract, or where a stipulation making time of the essence has been waived, time may be made of the essence, where there is unreasonable delay, by a notice from the party who is not in default fixing a reasonable time for performance and stating that, in the event of non-performance within the time so fixed, he intends to treat the contract as broken. The time so fixed must be reasonable having regard to the state of things at the time when the notice is given, and to all the circumstances of the case.'

On the basis of the principle as stated above, I shall examine and consider the facts and circumstances of this case in deciding whether the termination of the said agreement by the plaintiff was lawful or otherwise. From the affidavit of the plaintiff in support of this application, the following correspondences between the plaintiff and the defendant were attached:

1 In exh SPT-5 the plaintiff faxed a letter dated 30 December 1997 to the defendant referring to an earlier discussion between the plaintiff and one Madam Rose Chong, presumably an employee of the defendant, as

regards the delay in the completion and handing over of the said lot. In the said letter, the plaintiff also indicated his desire to sell back the said lot to the defendant.

2 On 23 March 1998, the defendant replied to the plaintiff's letter informing the plaintiff that the estimated completion of the said property would be by the end of 1998 (exh 8PT-5 encl 2).

3 In exh SPT-6 — the plaintiff's solicitors wrote a letter to the defendant dated 12 May 1998 stating the plaintiff's concern of the delay in the delivery of vacant possession on the said bungalow lot to the plaintiff. In para 5 of the letter, the solicitors requested from the defendant detailed information of the progress of work affecting the plaintiff's lot and the estimated date of delivery of vacant possession of the said lot.

4 Another letter from the plaintiff's solicitors dated 17 June 1998 also asking for information on the progress of work.

5 On 20 September 1999, Tetuan Gideon Tan Razali Zaini, solicitors for the plaintiff, issued a letter to the defendant terminating the said sale and purchase agreement between the plaintiff and the defendant in respect of the said bungalow lot and at the same time demanded the sum of RM108,286.36 being the amount of 30% of the purchase price paid by the plaintiff to the defendant plus other related expenses incurred by the plaintiff in respect of the purchase.

6 On 13 October 1999, the defendant wrote to the plaintiff's solicitors in reply to their letter dated 20 September 1999. In this letter, the defendant informing that 'due to unforeseen technical issues on site, the whole development has been off-scheduled. However, till date most of the technical matters have been resolved and work would resume on site soon'.

The first question that I have to determine was whether the plaintiff had given any notice to the defendant giving a reasonable time to the defendant to deliver vacant possession of the said bungalow lot to the plaintiff. On detailed examination of the correspondences issued by the plaintiff's solicitors to the defendant, before the plaintiff issued the notice of termination vide the letter dated 20 September 1999 to the defendant, I was unable to find any such notice being issued. From the letters exhibited by the plaintiff, the letters issued before the termination were merely asking for information on the progress of work and estimated date of delivery of vacant possession of the said lot. I was unable to find any letter issued by the plaintiff giving the defendant any reasonable time to hand over vacant possession of the said bungalow lot to the plaintiff. As the giving of such notice is regarded as a condition precedent before issuing the letter of termination of the said agreement the failure on the part of the plaintiff to give such notice was fatal. The only notice that had ever been issued by the plaintiff was in para 5 of the plaintiff's solicitors' letter to the defendant dated 12 May 1998 which reads:

> We have been instructed by our client to request from you detailed information of the progress works affecting our client's lot and the estimated date of delivery of vacant (possession) within fourteen (14) days from the date hereof.

However, on close scrutiny of the content of this paragraph it could not be regarded as the notice as required to be issued within the meaning of s 47 of the Act. The 14-day notice as stated in the said letter was merely requested the defendant to furnish the detailed information on the progress of works affecting the plaintiff's lot. Even assuming that such was the required notice, the giving of only 14 days would not come within the term '*reasonable time*'. As clearly explained by the defendant, the project undertaken was massive involving hundreds of million ringgit in developing the land which was originally mountainous jungle. To date, the defendant had spent a sum of RM465,049,478 on the whole project and the cost of infrastructure works alone was RM88,112,560. The delivery of vacant possession of the said lot to the plaintiff is closely inter-related to the completion of the infrastructure works in respect of the whole development of the said land. In my view, the condition of the land prior to the development is an important factor to be considered in determining what would be the reasonable time to hand over the lot to the plaintiff. According to the defendant, the reason for not giving specific time for delivery of vacant possession in the sale and purchase agreement was simply that the defendant could not ascertain the completion of the project on the jungle area with mountainous terrain. Furthermore, the catastrophe befalling the Highland Towers had caused the relevant authorities to put a temporary halt to all developments situated in hilly areas and that included the defendant's project.

In addition to that, the defendant contended that the delivery of vacant possession of the said lot is conditional upon the completion of the infrastructure works. The responsibility of completing the infrastructure works lies with the defendant. This is contained in cl 15(1) of the sale and purchase agreement which states:

> Delivery of Vacant Possession
>
> Subject to the purchaser having paid all purchase price instalments payable under cl 5(1) and all other monies due under this agreement and the purchaser having performed and observed all the terms and covenants on his part under the agreement, the vendor shall let the purchaser into vacant possession of the said Plot upon completion of the infrastructure works referred to in cl 12 hereof.

Clause 12 referred to in cl 15(1) above deals with the responsibility of the defendant to construct the basic infrastructure serving the housing area including roads, drains, culverts and water mains in accordance with the requirements and standards of the appropriate authorities. From the facts and circumstances of this case and having regard to the provision of cl 15(1) above, which did not state the specific date of delivery of vacant possession it cannot be said that the plaintiff was not aware of possible delay of the delivery when he signed the sale and purchase agreement. In such circumstances, it was highly improper for the plaintiff to terminate the agreement and at the same time ask for the refund of the money he had paid to the defendant. From the correspondence as mentioned above, it was clearly apparent that his real intention was to sell back the said lot to the

A defendant and recover the whole amount that he had paid. Since there was no real response from the defendant, the plaintiff decided to file this action to recover not only the sums that he had paid to the defendant for the purchase of the said lot but also other expenses that he had incurred including the legal fees to his solicitors. In my view, the court should not entertain such intention.

B

Having regard to the whole circumstances of this case, I arrived at the conclusion that the termination of the agreement by the plaintiff vide the letter dated 20 September 1999 issued by the plaintiff's solicitors, Tetuan Gideon Tan Razali Zaini, to the defendant was improper and unlawful because no prior notice giving reasonable time to the defendant to hand
C over vacant possession of the said lot had been issued to the defendant. I therefore dismissed the plaintiff's claim with costs.

Claim dismissed.

Reported by Andrew Christopher Simon

D

E

F

G

H

I